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**From:** Sweeney, Stephen  
**To:** Waye, Don  
**Sent:** 11/25/2014 1:15:20 PM  
**Subject:** Re: Legal Questions on CZARA Additional Management Measures - Attorney-Client Privilege

has Jeff distributed our three way piece on this yet?

Both JB and I had comments that Jeff said he was accepting.

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**From:** Waye, Don  
**Sent:** Friday, May 2, 2014 1:37 PM  
**To:** Sweeney, Stephen  
**Cc:** Hall, Lynda  
**Subject:** **Ex. 5 - Attorney Client** Attorney-Client Privilege

Stephen,

# Ex. 5 - Attorney Client

Thanks.

Don

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From the Additional MMs for Forestry section of the State of Oregon's recent submittal (presumably written by DOF), highlighting what I believe are critical passages:

## **Legal/Policy Framework for Additional Measures under CZARA**

EPA and NOAA's determination that Oregon is required to identify additional measures for forestry is based on the state's CWA Section 303(d) listing of a number of coastal streams for temperature impairment. It is important to note that additional measures in coastal nonpoint source plans under CZARA

are not intended to implement the CWA, but they are intended to be operated in conjunction with the CWA. Accordingly, it is appropriate for Oregon to identify additional measures to operate in conjunction with DEQ's TMDL program and its existing Section 319 nonpoint source programs.

Moreover, the EPA and NOAA guidance specifies that states are to determine what additional measures are needed and states are to have significant latitude in making the determination of what additional measures are needed. While states may elect to adopt additional or more stringent measures the 6217(g) guidance, e.g., extended buffers, they cannot be required to adopt that approach.

And from the comment letter from the Oregon Forest Industries Council and Oregon Small Woodlands Association (attached; see p. 3), highlighting what I believe are critical passages:

## **II. Legal Standard**

As highlighted above and in the Proposed Findings, CZARA requires a state to include in its CNPCP "additional management measures \* \* \* necessary to achieve and maintain applicable water quality standards." 16 USC 1455b(b)(3). However, CZARA also requires a relatively sophisticated three-step analysis whereby a state must identify certain land uses, identify certain critical areas, and only then implement additional management measures applicable to those land uses and critical areas. This Section discusses each step in turn.

First, the state must determine which land uses "individually or cumulatively, may *cause or contribute significantly to a degradation of* \* \* \* (A) those coastal waters where there is a failure to attain or maintain applicable water quality standards or protect designated uses, *as determined by the State* pursuant to its water quality planning processes; or (B) those coastal waters that are threatened by reasonably foreseeable increases in pollution loadings from new or expanding sources." *Id.* at 1455b(b)(1) (emphasis added). That is, the CNPCP need only identify those land uses the state determines cause or contribute significantly to a degradation of threatened or impaired coastal waters. See *also* CZARA Guidance, at 18-19. Notably, *the state* is to make the determination of which land uses should be subject to additional management measures, and CZARA includes no authority for the Agencies to second-guess that determination.

And finally, the portion of the CZARA statute itself—the only place where "Additional MMs" are mentioned in the statute, highlighting what I believe are critical passages:

### **(b) Program contents.**

Each State program under this section shall provide for the implementation, at a minimum, of management measures in conformity with the guidance published under subsection (g), to protect coastal waters generally, and shall also contain the following:

(1) Identifying land uses. The identification of, and a continuing process for identifying, land uses which, individually or cumulatively, may cause or contribute significantly to a degradation of--

(A) those coastal waters where there is a failure to attain or maintain applicable water quality standards or protect designated uses, as determined by the State pursuant to its water quality planning processes; or

(B) those coastal waters that are threatened by reasonably foreseeable increases in pollution loadings from new or expanding sources.

(2) Identifying critical coastal areas. The identification of, and a continuing process for identifying, critical coastal areas adjacent to coastal waters referred to in paragraph (1)(A) and (B), within which any new land

uses or substantial expansion of existing land uses shall be subject to management measures in addition to those provided for in subsection (g).

(3) Management measures. The implementation and continuing revision from time to time of additional management measures applicable to the land uses and areas identified pursuant to paragraphs (1) and (2) that are necessary to achieve and maintain applicable water quality standards under section 303 of the Federal Water Pollution Control Act (33 U.S.C. 1313) and protect designated uses.